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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 228

NYE & NISSEN, A CORPORATION, AND ABRAHAM MONCHARSH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 4602-4628) is reported at 168 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1948 (R. 4628-4629), and a petition for rehearing was denied July 22, 1948 (R. 4629). The petition for a writ of certiorari was filed August 17, 1948. The jurisdiction of this

Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, now 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the conviction of petitioner Moncharsh on the substantive counts, charging the presentation of false invoices to an agency of the United States, as an abettor or procurer of those offenses.

2. Whether the jury were properly permitted to consider in connection with the substantive counts, as evidence of the intent with which the offenses charged therein were committed, proof of similar offenses occurring at about the same time and showing a consistent pattern of conduct.

3. Whether there was a fatal variance between the allegations and the proof in respect of the conspiracy count.

STATEMENT

Count 1 of a 7-count indictment (R. 2-26) filed June 20, 1945,[1] in the District Court for the Northern District of California charged that from January 1, 1938, to the date of filing of the indictment, petitioners and three other defendants—Henry Berman, Ruby Goddard, and Edward Menges—conspired to defraud the United States, in violation

[1] Through a typographical error (cf. R. 38, 40), the date of filing of the indictment is given in the record as "June 20, 1946" (R. 26).

of Section 37 of the Criminal Code (18 U.S.C. [1946 ed.] 88, now 18 U.S.C. 371), by selling inferior butter, cheese, and eggs to the Army, Navy, and War Shipping Administration through fraud and deception practiced upon government inspectors (R. 4-5), by obstructing the governmental functions of inspecting, grading, and weighing such products (R. 5), and by misrepresenting such products as to grade, weight, and price (R. 5, 7, 8). The scope of the conspiracy charged and the manner in which it was allegedly carried out were set forth in detail (R. 5-8), and five overt acts were alleged (R. 8-10). Counts 2 to 7 charged the same defendants with substantive violations of 18 U.S.C. [1946 ed.] 80 (now, in pertinent part, 18 U.S.C. 1001) by knowingly misrepresenting, in invoices presented to the War Shipping Administration in connection with specific sales of eggs and cheese, the weights, grades, and prices of the particular products involved (R. 10-26). Following a trial by jury, petitioners and Berman and Goddard were found guilty on all counts, Menges being acquitted (R. 72-73). Petitioners were each fined $5,000 on each count, and petitioner Moncharsh was in addition sentenced to two years' imprisonment on the first count and to five years' imprisonment on each of the other six counts, all seven terms to run concurrently (R. 77-80). On appeal by petitioners alone, the judgments of conviction were affirmed (R. 4628-4629).

The evidence adduced by the Government may be summarized as follows:

Nye & Nissen, the corporate petitioner, carried on an extensive business in purchasing and selling eggs, butter, and cheese. Petitioner Moncharsh was the president and a director of the corporation, and owned a one-third interest in it. (R. 4037-4038.) Berman was employed in various capacities by a subsidiary of Nye & Nissen, and ultimately became the city sales manager of Nye & Nissen; his headquarters were at Nye & Nissen's main plant, where he had charge of the company's retail salesmen (R. 3395-3397). Goddard was Nye & Nissen's shipping and receiving clerk (R. 3885).

During the period from 1938 through 1944, Nye & Nissen made numerous large sales of its products to the Army and the Navy. After December 1943, it also sold large quantities of its products to vessels operated by various shipping companies under general agency contracts with the War Shipping Administration. (R. 4603.)

Witnesses for the Government, some of whom had been in the employ of Nye & Nissen for many years, testified to numerous incidents tending to establish the conspiracy charged, and linking Moncharsh, Berman, and Goddard in it. For example, once during 1941, upon instructions of Moncharsh and Goddard, candlers were instructed to prepare an Army order by placing Grade A eggs in some cases and eggs of an inferior grade in other cases. The cases of Grade A eggs were given an

identifying mark. When an Army inspector called to examine the order, it was arranged that he should inspect none but the cases containing Grade A eggs. Being so deceived, the inspector approved the whole order. (R. 462-500.)

On another occasion in 1941, in the presence of Moncharsh, Berman, and Goddard, the eggs in cases which had been inspected and approved by government inspectors were removed and inferior eggs, or "cut-outs," as they were called, were substituted (R. 892-895). Moncharsh and Berman helped in the transfer process for a while, but they "sort of kept bumping into each other, so they stopped and helped us put the covers on" (R. 894).

On still another occasion in 1941, a lot of fresh eggs was placed outside the candling room for inspection by an Army inspector. The inspector selected at random certain of these cases, which were taken into the candling room and examined by him. While this was being done, the remainder of the eggs were removed and inferior cold storage eggs substituted under Goddard's supervision. After the inspector had candled and approved the eggs which he had designated, he came out of the candling room and, under the assumption that the eggs there were of the same grade as those he had inspected, placed his stamp of approval on the whole lot. (R. 785-807). Moncharsh was not present during this switching process, but he had been present earlier when the original lot of fresh eggs was being prepared, and had instructed the em-

ployees "to do a good job because [the Army inspector] would be coming out on that order" (R. 805-806). Three or four days later, the inspector came back to inspect another Army order, and the same lot of fresh eggs which had previously been sampled and approved was again submitted to him. In the same manner as before, storage eggs were substituted for the fresh eggs from which the inspector had selected certain cases for examination. This process was repeated several times. In all, the inspector inspected the same lot of eggs five or six times. (R. 810-812).

Once in 1938, following rejection by the Army of a certain order of eggs, Moncharsh questioned Nix, an employee, concerning the rejection. Nix said to Moncharsh, "We used these same egg samples for a long time and they are old as the hills." Moncharsh replied in a jocular tone, "You can't go by eggs, don't forget on wine the older it gets the better it is." This testimony was objected to, but, upon government counsel's pointing out that it tended to show Moncharsh's knowledge of the fact that inspection of the same eggs had been made over and over again, the evidence was admitted. (R. 840-842.)

From 1935 to 1939, Goddard and other employees of Nye & Nissen used a counterfeit stamp, similar to an official Department of Agriculture stamp, for the purpose of stamping cases which had not been inspected and which contained inferior eggs (R. 843-851). This stamp was retained in the custody of Goddard, who kept it in a wooden box "upstairs

in the main office," *i.e.*, Moncharsh's office (R. 846, 848-849). Pineda, the employee-witness who told about the counterfeit stamp, testified that he had seen it used in the fraudulent manner described "forty or fifty times" (R. 851), but never in the presence of a government inspector (R. 846). Once, while Goddard was using the stamp, he had Pineda "stand outside and make sure no one came down while he stamped cases of eggs"; Goddard was warned of some one's approach, and he "placed the stamp down [and] took a look," but immediately "picked up the stamp and put it in his pocket," saying, "It doesn't pay to leave this around" (R. 850). Another employee-witness, Andrade, testified to seeing petitioner Moncharsh using this stamp. On this occasion, Moncharsh was surprised by the sudden return of a Department of Agriculture inspector who had just left, and Moncharsh "hurried and stuck [the stamp] in his pocket." Jack Smith, vice-president of Nye & Nissen, who was present at the incident, later said to Moncharsh, "Abe, if you don't cut this kind of business out you are going to get all of us in the penitentiary." Moncharsh replied, "What is the matter with you guys? Are you afraid? These guys don't know nothing anyhow." (R. 3258-3259.)

Once in 1939, an Army inspector, Colonel Kielsmeier, had rejected a truckload of eggs purchased from Nye & Nissen. The truck driver, Andrade, called the office and informed Moncharsh of the fact

of the rejection. According to Andrade, Moncharsh asked "if there was any possible way that I could pass the load." (R. 3248.) When Andrade replied in the negative, Moncharsh told him to bring the load back to the warehouse, but to be sure that no Army car was around before backing in. Andrade brought the eggs back, and Moncharsh "pulled the stakes off the truck before I hardly even got off the truck," and proceeded to candle the eggs in one of the sample cases in the load. (R. 3248-3249). Later, Colonel Kielsmeier arrived, and Moncharsh told him that "they were beautiful eggs, he couldn't see why he rejected the eggs," but Kielsmeier advised Moncharsh that "he didn't want them eggs. He didn't want them kind of eggs delivered out to the post at any time when he was holding inspections." After Kielsmeier left, Goddard asked Moncharsh "what to do with the load," and Moncharsh gave orders that the "two sample cases" on the rejected load be replaced by two "new samples," but that otherwise the same load be redelivered. (R. 3250.) To minimize the chances that Colonel Kielsmeier would again be on hand to inspect the load, however, Moncharsh directed that delivery be delayed until "after two or two-thirty," by which time Kielsmeier would probably have left the Army base. Accordingly, Andrade again delivered the "same eggs with a difference of two cases." (R. 3251.) It does not appear whether or not the stratagem succeeded.

Other illustrations of the manner in which the conspiracy charged was carried out are set forth in the opinion of the Court of Appeals at R. 4610-4612. And see R. 4613-4614 for additional evidence establishing petitioner Moncharsh's complicity in it.

The evidence in support of the charges of substantive offenses contained in counts 2 to 7 is aptly summarized in the opinion of the Court of Appeals as follows (R. 4612-4613):

> The proof for the years 1943 and 1944 concerns chiefly the delivery of eggs and cheese to 17 different ships operated by the War Shipping Administration. These deliveries were generally made under the supervision of Berman or Goddard. Sales to the War Shipping Administration during 1944 required inspection prior to delivery, and this was done by the United States Department of Agriculture. One of the 17 deliveries occurred in 1943, the rest in 1944. Six of them are the ones involved in the false claims counts. In none of them did the products delivered entirely conform with the grade, weight or quality stated in the invoices covering them. In one instance, 6 cases of eggs invoiced Grade AA were so poor as to be entitled to no grade whatever. In another, "several layers" of 3 dozen eggs each were missing from some of the cases. In another, the weights were scraped off boxes containing cheese, the invoice indicating that the cheese was of greater than actual weight. In another, cases of eggs bearing inspection stamps and invoiced as medium AA were found to be

Grade B small. In another, 10 cases of peewees were intermingled with cases of mediums, the whole being invoiced as mediums. Many of the cases delivered bore no inspection stamps.

ARGUMENT

1. Petitioner Moncharsh does not question the sufficiency of the evidence tending to establish his complicity in the conspiracy to defraud the Government charged in the first count of the indictment, but urges that the evidence is insufficient to sustain his conviction on the six substantive counts, charging him and his codefendants with knowingly presenting false invoices to an agency of the United States (Pet. 11-18). That contention, we submit, is clearly without merit.

With reference to the six substantive counts, the trial court instructed the jury—and the correctness of the instruction is not disputed (see Pet. 12-13)—as follows (R. 4368):

> In determining whether each of the defendants made or used these invoices, or caused them to be made or used, it is not required that you find that each defendant saw or handled the invoices or were present when they were made. One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly. Consequently, if you find that one or more of the defendants aided, induced, or otherwise procured the making or using of these invoices, then you must find that they caused them to be made or used within the meaning of the statute.

The jury were plainly warranted in finding Moncharsh guilty on the substantive counts under this instruction. It is true that the evidence did not directly connect Moncharsh with the presentation of the false invoices involved in these counts. But obviously no such direct proof was required. Moncharsh was the president of, and a substantial shareholder in, the corporation whose invoices were involved, and was extremely active in its affairs. The evidence overwhelmingly established his participation in the elaborate scheme to defraud the Government, and indeed showed that he was the principal figure in the conspiracy, the moving spirit who directed the fraudulent activities of his subordinates.[2] The fraudulent misrepresentations made in the invoices involved in the substantive counts were not isolated incidents, separate and distinct from the earlier frauds on the Government with which Moncharsh was directly connected, but were merely pieces in the whole

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[2] In addition to the evidence reviewed in the Statement, *supra*, pp. 4-8, establishing this fact, was the testimony of Pineda that Moncharsh had "general supervision of all the operations of the plant," so that "if anything went wrong or anything had to be done, he was the man to give the final word. * * * He would come down and tell us what to do, or tell Ruby [Goddard] what to do. Sometimes Ruby wasn't around. If we was doing something wrong, he would correct us" (R. 446). The fact was further confirmed by the admissions of Moncharsh himself to agents of the F. B. I. that he was personally familiar with the type and quality of "all eggs sold and delivered out of Nye & Nissen's plant in San Francisco," that he "was familiar with the grading of all eggs sold to the Government from that plant," and that he "personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices on their products" (R. 4339-4340, 4346-4347).

pattern.[3] "All misconduct of defendants," as the Court of Appeals observed (R. 4615), "was germane to one consistent and persistent course of wrongdoing." There is no evidence that Moncharsh, having once joined the conspiracy to defraud that the proof overwhelmingly established, withdrew from the plot before the period in 1943 and 1944 in which the false invoices figured, so that the frauds connected with them could be said to have been none of his affair. Cf. *Hyde* v. *United States*, 225 U. S. 347, 369. Consequently, the jury were fully justified in finding from the evidence as a whole against Moncharsh, as the admittedly correct instructions of the court permitted them to find, that, as president of the corporation and the chief perpetrator of its many frauds against the Government, he was not only party to, but, indeed, induced and procured, the substantive offenses charged in counts 2 to 7.

It is contended, however, that the Court of Appeals, in affirming Moncharsh's conviction on the substantive counts, erroneously applied the principle of liability of a conspirator for the substantive crimes of fellow conspirators committed in furtherance of the conspiracy (*Pinkerton* v. *United States*, 328 U. S. 640), the alleged error flowing from the fact that the trial court did not submit the issue of his guilt on those counts to the jury on

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[3] As indicated, *supra*, pp. 2-3, misrepresentation of the grades, weights, and prices of eggs, butter, and cheese was "part of the plan and conspiracy" alleged (see R. 5, 7, 8).

the *Pinkerton* theory, but rather on the theory that he could be convicted of the substantive offenses as a principal if he was found to have aided, abetted, induced, or procured those offenses. While we by no means concur in petitioner Moncharsh's criticism of the rationale of the Court of Appeals' opinion in this respect (see R. 4616-4619), but on the contrary think that rationale valid, we submit that the question of its correctness need not here be reached. For, as we have shown, the jury's verdict as to Moncharsh on the substantive counts was entirely warranted, if not compelled, under the aider-and-abettor instruction which was actually given, the correctness of which is not disputed.[4]

2. As indicated in the Statement, *supra*, pp. 9-10, evidence was adduced that in the years 1943 and 1944 some 17 deliveries of eggs and cheese were

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[4] It should be pointed out, too that the instruction actually given—requiring the jury to find that Moncharsh aided, abetted, induced, or procured the commission of the substantive offenses in order to convict him on those counts—was more favorable to him than would have been the legitimate instruction permitting them to convict him of those offenses if they were found to have been committed by any party to a conspiracy of which he was a member and in furtherance thereof (the *Pinkerton* principle). For the substantive offenses were plainly in furtherance of the conspiracy charged in the first count, and, equally plainly, as seen from the jury's conviction of Moncharsh on that count, of which he does not complain, they believed that he was a party to that conspiracy. An instruction couched in terms of the *Pinkerton* principle, therefore, would have made a finding of guilt on the substantive counts virtually automatic, whereas, under the instruction actually given, an affirmative determination beyond a finding of complicity in the conspiracy—*viz.*, that he aided, abetted, or procured the commission of the substantive offenses—was required before a finding of guilt on those counts could be made.

made to 17 different ships operated by the War Shipping Administration, each delivery involving a false invoice. In only six of these instances, however, was the filing of the invoice charged as a separate substantive offense (counts 2 to 7). Proof of the presentation of the other invoices was received at the trial as evidence of the conspiracy charged in the first count and as overt acts in furtherance of the conspiracy. At the conclusion of the case, the court granted a motion of the Government to admit the proof of these other offenses as evidence relating to the substantive counts as well, on the theory that they were similar offenses tending to show the criminal intent with which the particular false invoices involved in those counts were filed (R. 3342-3343, 4354-4355). Petitioner Moncharsh contends that this was error as to him (Pet. 18-20), because, he says, "there was no evidence whatever that [he] had any part in the substantive offenses, or in the other offenses of similar nature" (Pet. 19).

As we have shown in the preceding point, however, the underlying premise of this argument is completely refuted by the great mass of evidence that was marshalled against Moncharsh, from which the inference that he induced and procured the substantive offenses was entirely justified. The action of the trial judge in granting the Government's motion and instructing the jury that the evidence of the other, similar offenses was admitted for the purpose of showing "guilty intent, motive,

or guilty knowledge" in respect of the substantive offenses charged (R. 4377) was clearly proper. For it is well settled that evidence of offenses other than, but similar to, those charged in the indictment is admissible to show the criminal intent or guilty knowledge with which, or the motive for which, the offenses charged were committed, or to show a consistent pattern of conduct in connection with which the offenses charged were committed, and for other kindred purposes. *Weiss* v. *United States*, 122 F. 2d 675, 681-685 (C.C.A. 5), certiorari denied, 314 U. S. 687, and the many authorities there cited.

3. Petitioners' contention that there was a fatal variance between the allegations and the proof in respect of the conspiracy count (Pet. 20-23) is also without merit.

It is argued that while the indictment charged a single, continuing conspiracy beginning in 1938 and lasting until 1945, the proof showed two distinct conspiracies. The first, it is said, had as its object "interference with proper inspection of products designated for the Army and Navy only. There was not a whisper of [a] false voucher * * * [and] no mention of the War Shipping Administration" (Pet. 21). The second conspiracy, on the other hand, "no longer touched upon the impairment of the inspection system. It no longer concerned products destined for * * * the Army and Navy. Rather, it related only to the specific deliveries of eggs and cheese to certain

merchant ships operated by steamship companies as agents for the War Shipping Administration. The evidence [relating to it] * * * was such as to permit an inference of a conspiracy to commit an offense against the United States, namely, the filing of false vouchers * * *" (Pet. 21-22). The first conspiracy, the argument continues, "did not go beyond the year 1942," and "the persons to whom this evidence related were occasionally Moncharsh and the three other personal defendants [Berman, Goddard, and Menges]" (Pet. 21), whereas the second conspiracy was limited to the years 1943 and 1944, and the evidence relating to it "was such as to permit an inference of fraudulent conduct on the part of only two of the defendants [Berman and Goddard]" (Pet. 22).

The basic fallacy in this contention of petitioners is that it overlooks the fact that what the indictment charged was a conspiracy "to defraud the United States" (R. 4). The evasion of the inspection systems of the Army and Navy, and the misrepresentations in invoices submitted to the War Shipping Administration of the grades, weights, and prices of products delivered to it were merely specific methods whereby, according both to the allegations and the proof, the conspiracy was, and was intended to be, carried out. The conspiracy was clearly unitary in nature, and continued throughout the period alleged in the indictment. Cf. *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *Kissel*, 218 U. S. 601, 607. The

mere fact that the evidence relating to the frauds on the inspection systems of the Army and Navy was limited to the year 1942 and earlier,[5] while that pertaining to the fraudulent misrepresentations in invoices presented to the War Shipping Administration (which agency did not come into existence until 1942, see note 6, *infra*) related to 1943 and later, is obviously immaterial. All three of these departments being merely arms of the Government, the United States was equally defrauded whether one or another of the three branches happened to be the medium through which it was being cheated at a given time.

Finally, the assumption on which the present contention partially proceeds—that there was no basis for an inference that Moncharsh was a party to that phase of the conspiracy involving the filing of false invoices with the War Shipping Administration—is without foundation, as we have shown under point 1, *supra*, pp. 10-12.[6]

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[5] There is no reason to suppose, however, that the frauds of this character suddenly ceased in 1942. The principal government witnesses who testified to frauds of this type, former employees of Nye & Nissen, discontinued their employment at about that time or earlier. Pineda left in October 1942, except for about five weeks in February and March of 1943 (R. 444-445), and Andrade left in 1940 (R. 3219).

[6] Petitioners' only other contention (Pet. 23-24)—that the conspiracy count was "duplicitous" because it alleged a continuing conspiracy, lasting from 1938 to 1945, to defraud the Government by deceptively selling inferior products to "the United States of America—War Shipping Administration, War Department, and Navy Department" (See R. 4), whereas in fact the War Shipping Administration was not created until 1942—is plainly insubstantial. Though petitioners filed a 25-point demurrer to the indictment (R. 26-38) and a motion to

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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SEPTEMBER 1948.

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quash (R. 38-40), as well as a 106-point demand for a bill of particulars (R. 41-56), all of which indicate the searching care with which the indictment was scanned for defects, the point now urged was not raised prior to the trial, nor, indeed, so far as appears, at any time thereafter prior to appeal. Even if there were technical merit in the point, therefore, there was manifestly no prejudice. But the point lacks even technical merit. The common-sense meaning of the conspiracy count was that the scheme to defraud the Government through various agencies originated in 1938 and lasted until 1945, the War Shipping Administration entering into the conspirators' plans as one of the media through which the fraud would be accomplished some time after, obviously, it came into being. Cf. *Rose* v. *United States*, 149 F. 2d 755, 757-758 (C.C.A. 9).

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